

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL
WITH PROOF
OF SERVICE

76-7459

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO,
Plaintiff-Appellee,

-against-

LOUIS COMMARATO, PRESIDENT AND BUSINESS MANAGER OF
LOCAL UNION NO. 400, SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION AFL-CIO, JOHN M. VAUGHN, FINANCIAL SECRETARY
OF LOCAL UNION NO. 400, SHEET METAL WORKERS' INTERNA-
TIONAL ASSOCIATION, AFL-CIO; FRANCES MAIDA, RECORDING
SECRETARY OF LOCAL UNION NO. 400, SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, AFL-CIO; AND LOCAL UNION NO.
400, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,
AFL-CIO,

Defendants.

LOCAL UNION NO. 400, SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION, AFL-CIO,

Defendant-Appellant,

LOUIS COMMARATO, PRESIDENT AND BUSINESS MANAGER OF
LOCAL UNION NO. 400, SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION AFL-CIO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

CHARLES R. KATZ
Attorney for Defendant-Appellant and Appellant
360 Lexington Avenue
New York, New York 10017

(5852B)

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APPELLANT'S BRIEFPreliminary Statement

This is an appeal from the Order of Werker, J. signed August 20, 1976 and entered August 23, 1976 in the United States District Court for the Southern District of New York which modified and expanded the injunction order of Metzner, J. made August 2, 1976.

Statement of Issues Presented for Review

1. Whether the court erred in its order made August 20, 1976, which modified and expanded the injunction order of the court made August 2, 1976 by naming Appellant Louis Commarato in said order against whom the cause of action had been dismissed.

2. Whether the court erred in its order made August 20, 1976 which modified and expanded the injunction order of the court made August 2, 1976 by requiring appellant Louis Commarato and defendant-appellant to deliver forthwith books, records and papers not the property of appellant Louis Commarato nor the defendant-appellant Local Union No. 400 Sheet Metal Workers' International Association, AFL-CIO.

Statement of the Case

Plaintiff-Appellees brought this injunction action in the United States District Court for the Southern District of New York and obtained an order entered August 2, 1976 which granted a preliminary injunction restraining Local 400, Sheet Metal Workers' International Association, AFL-CIO, their officers, employees and agents

(1) from taking any official action on behalf of Local Union No. 400, Sheet Metal Workers International Association, AFL-CIO, except upon approval of General President Edward J. Carlough or his personal representative;

(2) refusing to recognize and be bound by the order of trusteeship;

(3) refusing to recognize or be bound by the assumption of control by Daniel Pasquinucci, as representative of General President Carlough and Trustee over Local Union No. 400, pursuant to said order of trusteeship;

(4) refusing to turn over all monies, books, records and property of Local Union No. 400 to Daniel Pasquinucci as said representative and Trustee;

(5) refusing to vacate the office of Local Union No. 400 at 1435 Broadway, New York, N. Y. upon direction of Daniel Pasquinucci.

Defendant-Appellant Local Union No. 400 and Appellant Louis Commarato filed a cross-motion to dismiss the complaint against Louis Commarato, individually. The court granted the cross-motion and entered an endorsed order filed July 22, 1976 dismissing the complaint as to Louis Commarato, President and Business Manager of Local Union No. 400, Sheet Metal Workers' International Association, AFL-CIO and the other individual defendants. The only defendant left in the action was defendant-appellant. None of the other defendants have been served with the complaint.

Plaintiff-Appellee moved by order to show cause made August 13, 1976 to adjudicate defendant-appellant and appellant in civil contempt of the court's August 2, 1976 injunction order.

On August 20, 1976 the court made an order which was entered August 23, 1976 against Louis Commarato, individually and other defendants, which modified and expanded the court's injunction order entered

August 2, 1976 and required Louis Commarato and other defendants to deliver to the Local Union No. 400 Trustee Daniel Pasquinucci all documents, agreements, trust indentures, plans of benefits, rules and regulations, all amendments or modifications thereto, and all other papers relating to all health, welfare and/or pension funds.

On September 15, 1976 a notice of appeal was filed from the order of the court made August 20, 1976 and entered August 23, 1976.

STATEMENT OF FACTS

The opinion of Metzner, J. dated July 21, 1976 provides "An injunction running against Local 400, its officers, agents, etc. shall issue." (A-11)

The order of Metzner, J. entered July 22, 1976 dismissed the plaintiff-appellee's complaint against Louis Commarato, individually, (A-4) leaving only Defendant-Appellant Local Union No. 400 in the action, no service of the complaint having been made on the remaining defendants.

The counter-order of Metzner, J. entered August 2, 1976 restrains and enjoins "defendant Local Union No. 400, Sheet Metal Workers' International Association, AFL-CIO, their officers, employees and agents are restrained and enjoined from:

"4. Refusing to turn over all monies, books, records and property of Local Union No. 400 to Daniel Pasquinucci, as said Representative and Trustee, . . ."

The order of Werker, J. made August 20, 1976 and entered August 23, 1976 ordered that "Louis Commarato and other defendants herein. . . deliver forthwith to Local Union No. 400 trustee Daniel G. Pasquinucci all documents, agreements, trust indentures, plans of

benefits, rules and regulations, all amendments or modifications thereto, and other papers relating to all health, welfare and/or pension funds which are or ever have been provided for. . . " (A 28.)

SUMMARY OF ARGUMENT

The lower court in its order made August 20, 1976 and entered August 23, 1976 erred in naming appellant Louis Commarato in its order despite the fact that its prior order of July 22, 1976 dismissed the complaint as to the said appellant.

The lower court in its order made August 20, 1976 and entered August 23, 1976 further erred by modifying the injunction order of the court entered August 2, 1976 which only required the turning over of the books and records and property of Local Union No. 400 by requiring the delivery of "other papers relating to all health, welfare and/or pension funds which are or ever have been provided for. . ." which clearly failed to recognize that the documents relating to health, welfare and pension funds are not the property of defendant-appellant nor appellant but the property of parties who had never been made parties to the action and who are legal entities, separate and apart from defendant-appellant and appellant.

ARGUMENT
POINT I

THE ORDER APPEALED FROM IS A MODIFICATION
AND EXPANSION OF THE PRELIMINARY INJUNCTION
ORDER ISSUED BY THE COURT BELOW.

In the order entered in the court below on August 2, 1976 (A 12) Judge Metzner restrained and enjoined the defendant-appellant Local Union No. 400, Sheet Metal Workers' International Association, AFL-CIO, its officers, employees and agents from doing certain specific acts which included:

"4. Refusing to turn over all monies, books, records and property of Local Union No. 400 to Daniel Pasquinucci as said Representative and Trustee."

Pursuant to that order, defendant-appellant turned over to Trustee Daniel Pasquinucci the property, records, books and monies of defendant-appellant.

By order to show cause dated August 13, 1976 plaintiff-appellees brought a civil contempt proceeding against "defendants" for their alleged failure to comply with the order of Judge Metzner. The sole basis of that proceeding was the failure to turn over certain documents relating to health, welfare or pension funds. Defendant-Appellant advised plaintiff-appellee that said funds were independent, distinct entities not party to the proceeding and that the property demanded belonged to said entities.

No adjudication of contempt was made, instead Judge Werker issued an order on August 20, 1976 (A 28) which directed that "Louis Commarato and other defendants" deliver to the Local Union No. 400 Trustee all documents, agreements, trust indentures, plans of benefits, rules and regulations, all amendments or modifications thereto, and all

other papers relating to all health, welfare and/or pension funds.

This direction was in fact a modification and expansion of the preliminary injunction issued by Judge Metzner.

It is clearly provided in 29 U.S.C. §1292 (a) (1) that the Court of Appeals has jurisdiction of appeals from

"Interlocutory orders of the district courts of the United States. . . or of the judges thereof, granting, continuing, modifying, . . . injunctions . . .

The order appealed from was more than mere regulation of the process of litigation. It went to the very heart of the merits of the action and the parties thereto.

In our case appellant Commarato had been dismissed as a defendant. (A 4) The order of Judge Metzner ran against "officers, agents and employees" of Local Union No. 400. By proceeding to obtain a contempt citation against "defendants" urging that Commarato refused to do certain required acts, clearly ignored the fact that Commarato was no longer a defendant. Similarly, the order of Judge Werker running specifically against "Louis Commarato and other defendants" ignores the fact that only one defendant remained i.e., Local Union No. 400 Sheet Metal Workers' International Association, AFL-CIO. By the inclusion of Commarato, Judge Werker modified the injunction previously granted.

The order of Judge Werker is the very kind of modification which this court has recognized as appealable as of right since it gives additional relief and is directly related to the substantive issues in the action which are awaiting trial. See International Prods. Corp.v. Koons, 325 F.2d 403 (2nd Cir. 1963). In fact an alleged violation of Judge Werker's order would place appellant Commarato in jeopardy of civil contempt. This was surely not contemplated in the original

injunction order as clearly evidenced by the fact that Judge Metzner did not sign plaintiff-appellee's proposed order which named Commarato individually. (A. 14) Instead a counter-order was signed which was limited to directing the "officers, employees and agents" of Local Union No. 400 (A. 12). This was required as the complaint had been dismissed as to the individuals defendants.

The order appealed from further modified the injunction issued by Judge Metzner by directing the turn over of certain property to the Trustee of Local Union No. 400 which property belongs to independent distinct entities, not party to the proceeding.

This relief goes well beyond the scope of the original order and well beyond the scope of the relief demanded in the complaint. Not until the contempt proceeding had plaintiff-appellee sought material from these Funds in this litigation.

POINT II

THE ISSUANCE OF THE ORDER
APPEALED FROM WAS AN ABUSE
OF THE COURT'S DISCRETION AND
BEYOND ITS POWER.

The proceeding below involved the imposition of a trusteeship upon a local union. In addition to the local union, the complaint named certain former officers of the defendant local individually. As to these defendants the court below dismissed the action. (A. 4)

Notwithstanding that dismissal, plaintiff-appellees continued to proceed as if the individuals remained parties to the proceeding. In its effort to enforce the injunction, it sought a contempt citation for the alleged failure of defendants, including appellant Commarato, to comply with the court's order.

Despite the fact that there was no finding that defendant violated Judge Metzner's order, Judge Werker issued the order appealed from which specifically directed appellant Commarato to turn over certain documents belonging to Funds which are separate and distinct entities from the local union.

The court thus failed to recognize the decision and order dismissing the action individually, and failed to make any finding with respect to the alleged failure to comply with the court's August 2, 1976 order. Instead, the court added what must be considered a new part to Judge Metzner's order for the production of welfare and pension fund property.

While it is clearly recognized that the court may modify a preliminary injunction issued pursuant to Rule 65 of the Federal Rules of Civil Procedure, such modification must be in the parameters of the proceedings as they exist. In this case, the court issued the instant order despite the fact that the motion before it was to adjudicate defendants in civil contempt, not to modify the order previously issued, and despite the fact that appellant Commarato had been dismissed from the action.

It is also axiomatic that where a party appears and the court dismisses him from the action, he cannot be made the subject of additional orders or directions unless his capacity is shown to be one against whom an injunctive order may be issued. In the proceeding below it is clear that appellant Commarato is not an officer, agent or employee of defendant appellant Local Union No. 400. Despite this fact, the court below issued an order directing Commarato to do certain acts. This was in error.

The record in this case demonstrates that plaintiff-appellee seeks to discount the fact of the dismissal of the individual defendants from the proceeding. Subsequent to the entry of Judge Werker's order a new proceeding to adjudicate defendants in civil contempt was commenced by plaintiff-appellee based on alleged failure of defendants to comply with Judge Werker's order. (R. 31)

Therefore, the granting of the order appealed from was beyond the proper power of the court and an abuse of its discretion.

POINT III

THE ORDER APPEALED FROM REQUIRES
PRODUCTION OF PROPERTY RELATING
TO SEPARATE AND DISTINCT ENTITIES FROM
DEFENDANT-APPELLANT, NOT PARTIES TO
THIS PROCEEDING. THE MODIFICATION
OF THE INJUNCTION IN THIS REGARD WAS
IMPROPER.

The documents, the subject of Judge Werker's Order (A.28) relate to separate entities, not party to this proceeding. These documents are well beyond the scope and purview of Judge Metzner's original order against Local Union No. 400. (A. 12) The trust funds involved are collectively bargained multi-employer Welfare and Pension Trusts authorized by Section 302 of the Labor-Management Relations Act, 29 U.S.C. §186 and are separate and distinct entities from Local Union No. 400. Moreover, they are independently administered by their respective trustees and in fact, must be separate and distinct entities under law from the Local Union.

The courts have recognized such trust funds are distinct, separate entities.

* R. __ refers to documents in the record.

Williams v. United Distributive Workers, Council 30,
--F. , (E.D. Mich. 1976), 79 LC ¶11,598, the court stated:

"With respect to the Plaintiff's cause of action against the union, Defendants are correct in asserting that they cannot be held accountable for the allegedly improper distribution of benefits under the plan because they are undisputedly a legally distinct entity from the body administering the plan which is, as a matter of law, independent of both the union and the employer." (Emphasis supplied)

In Wynn v. Heller, 391 F.S.507, (S.D.N.Y. 1975), 88 LRRM 3049, 3050, the Court stated:

"While the Pension and Welfare Trust are for the benefit of the members of Local 1146, the funds are considered separate and distinct entities from the local union, and are independently administered."

Similarly, in Millman v. Int'l Organization of Masters, Mates and Pilots, -- Misc.-- (Sup. Ct., N.Y. County, 1965), 51 LC ¶51,270, the Court stated:

"The Pension Plan is independent of the Union and is administered independently by its Trustees."

It should be noted that Congress specifically provided the distinct and separate nature of collectively bargained Welfare and Pension plans from unions.

The plans referred to herein are employee benefit plans subject to reporting and disclosure requirements under Federal law separate from reporting and disclosure requirements of the Local Union.

Under the Welfare and Pension Disclosure Act, 29 U.S.C. §301 et seq. three types of funds were required to file annual reports with the Federal government. These reports were known as D(1) and D(2) reports. 29 U.S.C. §306. Under the recently enacted Employee Retirement Income Security Act (ERISA) 29 USC §1001 et seq. additional disclosure requirements have been imposed. The funds are employee ben-

efit plans as defined in ERISA 29 USC §1002 (1)(2). Initial filings and annual reports must be made by every entity covered by the Act to the appropriate federal agency. 29 USC §1021-1025. The reports are known as the EBS-1 reports and annual financial statements of the funds.

Quite separately and distinctly, a labor union organization must file annual reports with the Federal government under the Labor-Management Reporting and Disclosure Act, 29 USC §401 et seq. The reports are known as LM-1 and LM-2 reports and in addition, annual financial reports must be filed. (29 USC §431).

Similarly, the law imposes different bonding requirements for the respective fiduciaries of the Funds and union. See 29 USC §501 and 29 USC §1112.

Finally, even though a union has a tax exempt status under Internal Revenue Service Regulations, a fund must file its own application and receive its own tax exempt status.

Congress has clearly recognized the need to impose vigorous standards to keep employee benefit plans separate and distinct from local unions.

There can be no question that the documents sought are documents of the Trust Funds, not the defendant Local Union. The Trust Funds are separate legal entities and are not party to this proceeding.^{1/}

Judge Werker's order must be vacated since that order fails to recognize the independent and distinct nature of the funds from defendant appellant Local Union. The documents referred to are not the records of defendant union. Furthermore, it must be vacated since it improperly modifies and expands the injunction issued by Judge Metzner to include reference to an individual no longer a party to the proceeding.

^{1/} It should be noted that plaintiff-appellee has recognized this basic fact because it presently has pending in the court below a motion to amend and supplement the complaint to include the respective funds as defendants.

CONCLUSION

FOR THE REASONS STATED, IT IS
RESPECTFULLY SUBMITTED THAT THE
ORDER APPEALED FROM SHOULD BE
VACATED AND SET ASIDE.

Respectfully submitted,

CHARLES R. KATZ
Attorney for Defendant-Appellant
and Appellant

November, 1975

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

SCOTT ALVINO, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 5701-15 AVE BROOKLYN.

That on the 8 day of NOVEMBER, 1976,
deponent personally served the within APPELLANT'S BRIEF
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing _____ true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

COHEN WEISS & SIMON
ATTORNEYS FOR PLAINTIFF-APPELLEE
605 THIRD AVE.
NEW YORK, N.Y. 10017

Sworn to before me this

8 day of November, 1976

Scott Alvino

Michael DeBantis

MICHAEL DeBANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977

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